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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1474

GEORGE W. JAYNE,

Respondent,

vs.

COUNTY OF COOK,

Defendant,

BENJAMIN H. ADAMOWSKI, et al.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Now come the petitioners by their Attorneys, Benjamin S. Adamowski, Robert E. Adamowski, Paul D. Newey and Francis X. Riley, who pray that this court issue its Writ of Certiorari to the Supreme Court of Illinois to review the final order of that court, and allege as follows:

REPORT

1. There is no Opinion of the court below. The final order entered pursuant to Rule 315(a) of the Rules of the Supreme Court of Illinois (Ill. Rev. Stat. 1969, Ch. 110A, Par. 315(a)) denied the petitioners' Petition for Leave to Appeal (*Jayne* v. *County of Cook, etc.*, 44 Ill. 2d 163).

JURISDICTION

1. The final order was entered on January 27, 1970.

2. This petition for review of the order of the court below is filed pursuant to Section 1257(3) of Title 28, Judiciary and Judicial Procedure. (28 USCA 1257(3)).

QUESTIONS PRESENTED

1. Were petitioners unconstitutionally denied due process of law, when they were denied Appellate review of the final order of the Circuit Court of Cook County which Illinois provides to all litigants, as a matter of right?

2. Does the United States constitution guarantee due process of law to these single family homeowners, whose property is severely damaged by the rezoning of an environmental tract of land for a livery stable and riding academy, who are denied an appeal from a *nisi prius* court judgment, when an appeal in this type of civil action is provided by law, and "is a continuation of the proceeding," as a matter of right?

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STATUTE INVOLVED

Rule 301 of the Rules of the Supreme Court of Illinois, reads as follows: "Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding. All rights that could have been asserted by appeal or writ of error may be asserted by appeal. No formal exception need be taken in order to make any ruling or action of the court reviewable. (Ill. Rev. Stats. 1969, Ch. 110A, Par. 301).

These rules are the sole source of the right of review in Illinois, and are within the exclusive constitutional power of the Supreme Court. *People ex rel Stamos* v. *Jones,* 40 Ill. 2d 62, 66.

STATEMENT OF THE CASE

A. The Procedure.

The Circuit Court of Cook County, Illinois entered a final order on October 4, 1968, declaring the County's zoning ordinance void, as it applied to plaintiff's property, and ordered building permits to issue for construction of a riding stable. (R. 29-33)[1] On October 31, 1968 the affected homeowners filed a Notice of Appeal, within the statutory time. (*op. cit.* Par. 303(a)) The County of Cook did not appeal.

The Record on appeal was timely filed on February 13, 1969. The abstract of the record and appellants' brief were filed in accordance with the rules of the Supreme Court of Illinois, on July 29, 1969. (*id.*) Pars. 326, 342(e) and 343(a).

On July 30, 1969 the appellee moved to dismiss the appeal on the grounds that appellants were not parties of record in the trial court, and that they were neither injured by the judgment nor could they benefit from a reversal. (SR. 127)

The appellants, as is provided by law, (*id.*, Par. 303(c)(4)) moved to amend their notice of appeal, by adding to the phrase "the real parties in interest," (SR. 139) their individual names. On September 9, 1969 the Ap-

[1] The "R" references are to the Trial Court Record, Case No. 53785. The "SR" references are to the Appellate Court Record to the Supreme Court, No. 42686.

pellate Court denied that motion to amend. (SR. 162) At that time, it granted the motion to dismiss, *in haec verba*:

> The Court having considered the motion of Appellee to dismiss the appeal in the above entitled cause as per affidavit filed herein and having also considered the objections of Appellant to said motion, and being now fully advised in the premises, doth grant said motion.
>
> It Is Therefore Ordered By The Court that the appeal in the above entitled cause be and the same is hereby dismissed out of this Court.
>
> Appellee recover costs from Appellant.
> Execution may issue. (SR. 163)

On November 4, 1969, the appellants petitioned the Supreme Court of Illinois, for leave to appeal from the denial of the Appellate Court to hear this appeal. (*id.*, Par. 315(a) and (b)) When that petition was denied on January 27, 1970, the appellants had exhausted their State procedures, and at that time the federal question, the denial of due process arose.

B. The Appeal.

The timely notice of Appeal was captioned, as follows:

George W. Jayne,
Plaintiff-Appellee

vs. No. 68 L 1939

County Of Cook,
Defendant

Benjamin H. Adamowski et al.
Appellants

NOTICE OF APPEAL

Following the requirements of the Rule, (303(c)(2)) the notice read:

I.

The home owners, the real parties in interest in the above entitled action, herewith appeal from the order of the court below entered on October 4, 1968, declaring that the Cook County Zoning Ordinance is unconstitutional and invalid as applied to the property of the plaintiff above named.

II.

The appellants pray that the judgment of the court below be reversed and that the cause be remanded with instructions to enter an order holding the Cook County Zoning Ordinance constitutional and valid as applied to the property of the plaintiff.

When the defendants filed their motion challenging the standing of these injured homeowners to appeal, the latter moved immediately to amend the Notice of Appeal to read, as follows:

George W. Jayne,
Plaintiff-Appellee

vs.

County Of Cook,
Defendant

Benjamin H. Adamowski and Sally Adamowski, Arthur Cizek and Beulah Cizek, Kenneth Pattison and Margaret Pattison, Oliver Fisher and Agnes Fisher, Ray Sterbo and Edith Sterbo, Arno Hertel and Henrietta Hertel, Bruno Matuszak and Lillian Matuszak, Gunar Swanson and Esther Swanson, Robert Hummel and Erica Hummel, Clifford Gordon and Ruth Gordon and Daniel Sturm and Rose Sturm,
Appellants

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AMENDED NOTICE OF APPEAL

• • • • •

I.

The home owners, the real parties in interest in the above entitled action, Benjamin H. Adamowski and Sally Adamowski, Arthur Cizek and Beulah Cizek, Kenneth Pattison and Margaret Pattison, Oliver Fisher and Agnes Fisher, Ray Sterbo and Edith Sterbo, Arno Hertel and Henrietta Hertel, Bruno Matuszak and Lillian Matuszak, Gunar Swanson and Esther Swanson, Robert Hummel and Erica Hummel, Clifford Gordon and Ruth Gordon and Daniel Sturm and Rose Sturm, herewith appeal from the Order of the Court below entered on October 4, 1968, declaring that the Cook County Zoning Ordinance is unconstitutional and invalid as applied to the property of the plaintiff above named.

II.

The Appellants pray that the judgment of the court below be reversed and that the cause be remanded with instructions to enter an Order holding the Cook County Zoning Ordinance constitutional and valid as applied to the property of the plaintiff.

This amendment is permissible by rule. (Ill. Rev. Stat. 1969, Ch. 110A, Par. 303(c)(4)).

This was a *pro forma* amendment which did not change or supplement any substantive requirement of law, for these persons to appeal. In addition, it showed that four of the appellants were of record in the trial court. Ruth Gordon, (R. 292) Beulah Cizek, (R. 279) Esther Swanson, (R. 300) and Karen Koch, (R. 306) testified for the county, stating that the damage to their homes and to the area, would be substantial, if this horse stable operation was permitted in their neighborhood.

C. The Merits of the Appeal.

The appeal has substantial merit. The zoning administration, the County Zoning Boards of Appeals, and the County Board refused to rezone the plaintiff's property for this horse stable use. (Par. 7, R. 5) The area is one of substantial single family homes, in the outer suburban area of Cook County. (R. 221-22)

The plaintiff purchased the property with full knowledge that it was zoned B-1, Restricted Business. This meant, in terms of the ordinance, a neighborhood store. He purchased, and then applied for the lowest zoning classification known, B-5, General Commercial. This, in the parlance of the ordinance, was the dregs of permitted uses, from poultry slaughtering, through dog pounds to livery stables. This is not only an alien use, but it is in an area, where except for a primeval forest preserve, there are all single family homes in the over $30,000 classification (R. 222).

The plaintiff (R. 51) and two real estate men (R. 151 and 311) testified in support of the complaint. The plaintiff said the development would be a good one, and he was an experienced horseman. The two real estate men, who were from two remote areas of the county from the land here, said a livery stable wouldn't harm the area.

In contrast, the defendant produced the prime expert of the County, who had done the rezoning of the City of Chicago and of the County. (R. 196) He decried the use of this land for a livery stable. A local real estate man said the proper (highest and best) use of the plaintiff's land was, as zoned, for a small neighborhood convenience shopping area. (R. 210) Four homeowners, (supra, p. 7) told of the evils, inconveniences and in-

juries a commercial horse operation would do to them and to their lives.

Despite this overwhelming refutation to plaintiff, the trial court ordered the horse barn to be built. (R. 36) Thus, the merits of the appeal were substantially in favor of appellants, these petitioners. And, the denial of the appeal to them, has deprived them of a federally protected constitutional right of due process.

ARGUMENT

1. The petitioners had an absolute right of appeal under Illinois law.

Rule 301 of the Rules of the Supreme Court of Illinois reads, in pertinent part, as follows: "Every final judgment of a circuit court in a civil case is appealable as of right." This, of course, was a final judgment since it declared an ordinance of the county unconstitutionally void. (R. 33)

These petitioners within this rule proceeded properly. "The appeal is initiated by filing a notice of appeal." This, they did. (R. 34) Having invoked the jurisdiction of the Appellate Court, ("No other step is jurisdictional," Rule 301) these petitioners had effected "a continuation of the proceeding." (*id.*)

Illinois has long and repeatedly permitted appeals by persons who were not named parties in the trial court. Here, it was unnecessary for them to be parties because they were cooperating fully with the State's Attorney, the attorney for the county who was resisting the attack upon the ordinance. (R. 47)

A. The whole motion is based upon a plea that these appellants were not parties in the trial court. (Motion to Dismiss p. 1)

They were not the nominal parties nor did they seek to intervene in the court below. But, they were the homeowners in the immediate vicinity who opposed the plaintiff every step through the administrative process, and through the courts. They are the only *persons* adversely

affected by the judgment entered in the court below. The commonweal suffers only to the extent that these homeowners suffer. They are, therefore, the real parties in interest.

"The rule is that an appeal may be maintained by any person, whether or not a party to the record, who is injured by the order or will be benefited by a reversal where such interest appears in the transcript of record." *Grennan* v. *Sheldon,* 401 Ill. 351, 356. Beulah Cizek, (R. 279) Ruth Gordon, (R. 292) Esther Swanson, (R. 300) and, Karen Koch, (R. 306) testified to the injuries they will suffer by this judgment. (See, Amended Notice of Appeal) Those injuries and their interests all appear in "the transcript of record." The Supreme Court of Illinois has affirmed that this is sufficient stature for appeal. And, the appellants here qualify on the additional ground of interest. *Nott* v. *Wolff,* 18 Ill. 2d 362, 366. In the trial court, the main thrust of the appeal was the money loss to the plaintiff *vis-a-vis,* the accumulated loss to these petitioners. This is justiciable interest.

The rule of law, (*Upper Lakes Shipping Ltd.* v. *Seafarers' Int. Union,* 40 Ill. App. 2d 392, 401) has been extended to recognize that an appellee may be estopped from denying an appellants' interest. (40 Ill. App. 2d at 400) Here, the conduct of the appellee is manifest throughout the development of this case. (See, affidavit of Robert E. Adamowski in opposition to motion. (SR. 135)

B. As is shown above, where one is not a nominal or intervening party, he must show an injury by the judgment (or, the reverse side of the coin) a benefit by the reversal of that judgment. This has all been covered in point A above. These are the only parties to the injury

or to the benefit. To dispose of another qualification of interest, the power "to release errors," (40 Ill. App. 2d at 401,) that is, the "acceptance of benefits" of the judgment or decree, the doctrine is irrelevant here. *Thoeming* v. *Hawkins*, 291 Ill. 454, 457; *United Typesetting Co.* v. *Congress Tr. & Sav. Bk.*, (1st Dist.) 278 Ill. App. 224, 226. If it be assumed that "release of errors" as applied to the judgment of the trial court, means accepting it or not appealing it, the appellants are as (and, now are more) competent to release errors, than is Cook County. The doctrine of "release of errors" is meaningless in this case, to these petitioners.

C. These petitioners are in privity with Cook County in this issue. They are, therefore, entitled to appeal the judgment below. This appeal was taken pursuant to Rule 301 of the Supreme Court (Ill. Rev. Stat. 1967, Ch. 110A) This is the successor to Section 74(1) of the Civil Practice Act, repealed. (S-H, Ill. Ann. Stat. Ch. 110A, pp. 333-34) As such, it provides for the appellants' right to appeal. The Appellate Court has said that under the historical doctrine, an appellant came within the statute, if he could show "he was privy to the record." (40 Ill. App. 2d at 401)

The Appellate Court then defined "privity," quoting: (*id.*)

> Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. The word "privy" includes those who control an action although not parties to it; those whose interests are represented by a party to the action; successors in interest to

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those having derivative claims. Restatement of Judgments § 83, Comment a. *Smith* v. *Bishop,* 26 Ill. 2d 434, 187 N.E. 2d 217. (*Upper Lakes Shipping,* 40 Ill. App. 2d at 401)

Not only do petitioners fit in every definition above, but are specifically included in "those whose interests are represented by a party to the action." Never did a phrase cover a given situation more thoroughly than it does here. For, who is more qualified to represent the collective interests of these property owners, than the corporate body designated by law. When Cook County opposed this action of plaintiff, it did so solely and completely, in the interest of these petitioners, who were the only people to be injured by the relief prayed here, or benefitted by its refusal.

These petitioners are the real, bread and butter, parties in interest. That interest appears of record. If the doctrine of "release of errors" applies, these petitioners are solely competent to release them. They should have been permitted to prosecute an appeal.

2. The failure of the Illinois Courts to entertain an appeal of the trial court's rider, denies these petitioners due process of law.

In Illinois an appeal from a civil judgment of the Circuit Court is an absolute right. (Rule 301, Ill. Rev. Stat. Ch. 110A) According to Illinois law these petitioners had the right to appeal, which is absolute. See, point 1, supra, 10) When these petitioners were denied that right,

"* * * it becomes the duty of this court to examine the course of procedure * * * to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the

Constitution prescribes." *Hansberry* v. *Lee,* 311 U.S. 32, 40.

It is these same two courts which are errant again. (*id.* at 38) In addition, these petitioners stress that the due process accorded a criminal defendant in the pursuit of his liberty, extends to the noncriminal litigant in the protection of his property. Again, denial of due process has reached the courts from Illinois.

In *Griffin* v. *People of the State of Illinois,* 351 U.S. 12, the question of whether the review of a criminal conviction as a matter of right, could be made dependent upon the purchase of a transcript of the trial. (at, 13) This court held it could not. In so holding, this court held that the poor "must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." (at, 19) The full meaning of this court's decision in *Griffin* is that Illinois is not required to provide appellate review in criminal cases, but if it does it must provide that review to all, equally. (at, 18)

So, here, these petitioners in a civil case do not claim a constitutional right of review. They do claim that Illinois by statute gives all litigants appellate review, and, therefore, they now have an absolute, constitutional right to be treated equally with all other litigants in that respect. Illinois also extends that right to persons not of record, who are injured by the judgment or who are benefitted by a reversal. These petitioners fit that condition from either or from both directions.

For the Illinois Appellate courts to deny these petitioners the rights available to all others, results in the "squalid discrimination" Justice Frankfurter warned the Illinois courts to avoid. (at, 24) This court should extend

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the equal treatment doctrine proclaimed in *Griffin*, to these civil litigants who have been denied appellate review, which is theirs as a matter of right.

WHEREFORE, the petitioners pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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No. 1474

BENJAMIN H. ADAMOWSKI, ET AL.,
Petitioners,

vs.

GEORGE W. JAYNE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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GEORGE W. JAYNE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

In answer to the Petition of Benjamin H. Adamowski, et al. for Writ of Certiorari to the Appellate Court of Illinois, First District, Respondent, George W. Jayne, says:

THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION HEREIN, AS THE CASE WAS DECIDED BY THE APPELLATE COURT OF ILLINOIS ON AN INDEPENDENT STATE GROUND.

George W. Jayne, as Plaintiff, filed an action in the Circuit Court of Cook County, Illinois, against the County of Cook. During the pendency of the action, Benjamin H. Adamowski, et al., were not parties to the proceeding and did not at any time seek to intervene therein. After judgment was entered, Benjamin H. Adamowski, et al., *complete strangers to the record*, filed a notice of appeal, and

the Appellate Court of Illinois, First District, dismissed the appeal on the Illinois State ground that they were not parties to the record and, therefore, had no right to appeal. A petition for leave to appeal from the Appellate Court of Illinois, First District, to the Supreme Court of Illinois was denied. No opinion was written by either court.

At no time did Benjamin H. Adamowski, et al., petitioners herein, raise any federal question, nor was any federal case or statute ever cited or referred to in the proceedings in the Illinois courts.

The only power that the Supreme Court of the United States has over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *Herb* v. *Pitcairn,* 324 U. S. 117 (1945). It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a decision of a state court that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U. S. 206 (1938); *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969); *Street* v. *New York,* 394 U. S. 576 (1969). The Supreme Court of the United States will not review a state court decision resting on an adequate and independent non-federal ground even though the state court also may have summoned to its support an erroneous view of federal law; and where the judgment of the state court rests on two grounds, one involving a federal question and the other not, and the ground independent of a federal question is sufficient in itself to sustain it, the Supreme Court of the United States will not take jurisdiction. *Radio Station WOW Inc.* v. *Johnson,* 326 U. S. 120

(1945); *Henry* v. *Mississippi*, 379 U. S. 443 (1964); *Jankovich* v. *Indiana Toll Road Commission*, 379 U. S. 487 (1965).

Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, the Supreme Court of the United States will not take jurisdiction to review the judgment. *Stembridge* v. *Georgia*, 343 U. S. 41 (1952).

Thus, where a federal constitutional question was raised in an Illinois trial court and an appeal was thereafter prosecuted to the Appellate Court of Illinois instead of to the Supreme Court of Illinois (which procedure under Illinois practice waived federal as well as state constitutional questions) such procedure also constituted a waiver of the federal constitutional question as to review by the Supreme Court of the United States. *Central Union Co.* v. *Edwardsville*, 269 U. S. 190 (1925); *Pennsylvania Rail Road Co.* v. *Illinois Brick Co.*, 297 U. S. 447 (1936); *Parker* v. *Illinois*, 333 U. S. 571 (1948). This is precisely what the Supreme Court of the United States decided in the last three cited cases, wherein review was sought from judgments of Illinois courts.

CONCLUSION.

From the above stated set of facts herein involved, it is crystal clear that the decision of the Illinois courts in the case at bar was based on an independent state ground. Therefore, the United States Supreme Court has no jurisdiction herein, as shown by the authorities discussed above.

For these reasons, the Petition for Certiorari to the Appellate Court of Illinois, First District, should be denied.

Respectfully submitted,

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REPLY TO ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

The following misstatements in respondent's Answer, demand correction for knowledge of the issue:

1. "The Supreme Court of the United States has no jurisdiction herein, as the case was decided by the Appellate Court of Illinois on an independent state ground • • •." (Page 1, Answer)

Correction: The federal question arose in this case when the Illinois Appellate Court, *refused* to decide the case at all. As a matter of right these appellants were entitled to litigate this state question. The Appellate Court of Illinois, abetted by the Illinois Supreme Court in its denial of leave to appeal, closed its doors on these litigants thereby denying them due process of law, enjoyed by all other litigants in Illinois.

2. These litigants are called "complete strangers to the Record." (Page 1, Answer.)

Correction. Benjamin H. Adamowski et al., are the single family homeowners damaged by the proposed horse stable. "et al.", includes Ruth Gordon, (R.292) Beulah Cizek, (R.279), Esther Swanson, (R.300) and Karen Koch, (R.306) homeowners, all of whom testified against the respondent. Each proved the damage to her home.

3. "No opinion was written by either court." (Page 2, Answer)

Correction. Both courts refused jurisdiction. This is the touchstone of the federal question. A total denial of due process.

4. "The Supreme Court of the United States will not review a state court decision resting on an adequate and independent non-federal ground . . ."

Correction. There is no "state court decision." The Courts of Illinois refused these litigants the right to be heard. This is exactly what happened in *Hansberry* v. *Lee*, 311 US 32, 40, when the Appellate and Supreme Courts of Illinois, refused those petitioners the right to litigate *their* question. It "is not that due process which the Fifth and Fourteenth Amendments require." (*id.*, at 41). Again, the Appellate and Supreme Courts of Illinois denied *Griffin* his right to due process, when it denied him a transcript of his trial, which he could not buy. The "unfolding content of 'due process'" (*Griffin* v. *Illinois*, 351 US at 21) forbids the establishment of "a general policy of allowing [civil] appeals", then creating a silent barrier "to the exercise of this opportunity." (*id.*, at 24)

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5. "Where the highest court of a state delivers no opinion and it appears that the judgment might have rested on a non-federal ground . . ." (Page 3, Answer)

Correction. "the highest court" and the next lower "highest court", didn't deliver an opinion. They refused jurisdiction. They refused a hearing. They denied due process. "The judgment" was never made. The right to have a "judgment" (judicial order) was denied. There was no hearing and no judgment. Everyone else in Illinois gets all of them as a matter of right. The denial of that right was a denial of due process within the contemplation of the federal Constitution.

I.

The full thrust of the legal argument in the Answer is that this court has no jurisdiction to review this case, because the basic trial involved a state issue. This is not only digressive nonsense, for the issue here is the denial of procedural due process; and every case cited by the respondent (pages 2 and 3) asserts this court's jurisdiction to determine due process in the review of state administration of its own rules of appellate procedure, and their application. Cf. *Henry* v. *Mississippi*, 379 US at 447.

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